UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

WESTERN CAB COMPANY	)	
	)	
and	)	
	)	Case Nos. 28-CA-131426
UNITED STEEL, PAPER AND	)	28-CA-132767
FORESTRY, RUBBER,	)	28-CA-135801
MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
AFL-CIO, CLC	)	
	)	

CHARGING PARTY'S POST-HEARING BRIEF

Pursuant to Section 102.42 of the Board's Rules and Regulations, Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") files this brief in support of the General Counsel's allegations made against Western Cab Company ("Western Cab" or "Company") in Case Nos. 28-CA-131426, 28-CA-132767, and 28-CA-135801.

I. INTRODUCTION

This is a case about an employer who refused to give the newly-recognized union notice of unilateral changes to mandatory subjects of bargaining. Here, the employer failed in its duty to bargain over changes to two core mandatory subjects of bargaining: (1) health insurance and (2) the exercise of discretion to discipline and discharge bargaining-unit employees. The employer wholly ignored its obligation to bargain in good faith with the Union by failing to give notice and an opportunity to bargain over changes to these mandatory subjects.

Additionally, the employer violated the Act by making various comments in violation of Section 8(a)(1) and prohibiting the distribution of *Trip Sheet* magazine because it contained an

advertisement placed by the union and a letter to the editor written by the union. The ad and the letter encouraged the employer to reach agreement on a contract with the union.

II. STATEMENT OF FACTS

Western Cab is a taxi company in Las Vegas, Nevada. It employs over 430 drivers. (Tr. 31).[1] Around March 2012, the Company voluntarily recognized the Union as the exclusive collective-bargaining representative of its drivers. (Tr. 35). The parties began bargaining a contract around June 2012. (Tr. 146). To date, they have not yet reached an agreement and no contract is in effect.

Various individuals have attended bargaining sessions on behalf of the Company including Attorney Greg Smith, Director of the Company Marilyn Moran, and General Manager Martha Sarver. The Union has also had various representatives at the bargaining table, including Union staff representative Steve Sullivan (June 2012 through January 2014); Assistant to the Director of District 12 Chris Youngmark (February 4, 2014); and Bill Locke, another staff representative (March 2014 through the present). (Tr. 152-153, 164). Western Cab driver Gezahegne Teffera also attended each bargaining session. (Tr. 186).

A. The Company's Unlawful Unilateral Changes to Health Insurance and Unilateral Discipline & Discharge

1. Bargaining before 2014

Apart from an issue related to the installation of credit card machines in the cabs, the parties did not have an agreement to immediately implement any tentative agreements ("TAs") reached during negotiations. (Tr. 33-34, 83-84). Additionally, there was no TA on a grievance

[1] The transcript will be cited to as (Tr. ___). Exhibits offered by the General Counsel will be cited to as (GC Exh. ___). Exhibits offered by the Respondent will be cited to as (R. Exh. ____).

procedure or any changes to health insurance. (Tr. 35, 146, 165-166; *see also* R. Exh. 34 (Company admission that "there is no formal grievance procedure")).

2. All the Company's Discipline Is Discretionary

The drivers at Western Cab are currently at-will employees; they can be fired for any reason at the Company's discretion. (Tr. 38).[2] When the Union was recognized and continuing to the present, Western Cab did not have an employee handbook. (Tr. 38). There is no document that limits Western Cab's ability to terminate drivers. (Tr. 38).

Western Cab considers a variety of factors when making a decision about what level of discipline to impose, including:

- Productivity, (Tr. 41);
- Attendance, (Tr. 42);
- The number of accidents a driver has had, (Tr. 42);
- Seniority, (Tr. 88, 100 (Sarver's testimony that "special consideration" given to drivers that "have been with us for a long time because I think they deserve it")); and
- The number of times an employee has committed the offense in question, (Tr. 60).

(See also Tr. 42-43 ("Q: So when you're looking at an issue such as low book, and it's not quite enough on its own to terminate, it really kind of depends on the rest of the circumstances on whether or not you will terminate that driver; is that right? A:Yes."); Tr. 88 (discipline is imposed on a "case by case basis")).

Sometimes the Company uses progressive discipline, but it always has the ability to skip all the lesser steps and terminate an employee at any time. (Tr. 40; see also Tr. 60-61 ("Q: So in

[2] See also Tr. 57 ("Q: So for any of the terminations, without going over every single one of them that involve accidents, the company retains the discretion to terminate, suspend or to issue a lower discipline; is that right? A: Yes, with some investigation. . . . Q: ---based on that investigation, then you make a decision which can vary? A: Yes.").

any of those situations, whether it was customer abuse or being hostile to other drivers or using racial slurs, the company could have decided anything from just talking to them all the way up to termination; is that right? A: Yes."); Tr. 65 ("Q: But then depending on what [falsified or mistaken] entry is that's on [the trip sheet], it may result in no discipline, if it was just an error, all the way up to termination; is that right? A: Yes."); Tr. 69 ("It depends on whether they just made a mistake or they did it on purpose knowing it was wrong and they put that down anyway, that's falsifying" and "management [and] operations" determines whether a driver was falsifying or simply making a mistake); Tr. 71 ("Q: And there's no set number of times that a driver brings a cab in late that would result in termination; is that right? . . . A: No, there's no set number."); Tr. 72-73 (no set number of at-fault accidents or occurrences of reckless driving results in termination). General Manager Martha Sarver was candid in her testimony that all discipline was discretionary and taken on a case-by-case basis:

Q: So like the other types of discipline, it really depends?

A: Yes. On the circumstances and what's happened.

(Tr. 78-79).

3. The January 1, 2014, Unilateral Changes to Health Insurance

Until January 1, 2014,[3] the Company required an employee to work one full year before becoming eligible for health insurance. (GC Exh. 8). Without any notification to the Union, the Company made changes to its health insurance eligibility on January 1. (*Id*.). The changes drastically reduced the amount of time an employee had to work before becoming eligible for health insurance from one year to the first of the month after sixty full days of employment. (*Id*.).

[3] All dates hereinafter will refer to 2014, unless otherwise indicated.

4. The February 4, 2014, Bargaining Session

Chris Youngmark, the Assistant to the Director of District 12, attended the February 4 bargaining session. (Tr. 152-153). At that meeting, the changes the Company had already made to health insurance were not discussed and the Union was not given notice of the already-made changes. (Tr. 158). There was no discussion about what procedure to use when terminating or suspending a driver or notification of any terminations or suspensions that the Company had already imposed. (Tr. 157-158).

Additionally, Marilyn Moran, Director of the Company, made numerous comments about the Company's attitude towards the Union. As Youngmark testified:

> [S]he proceeded to tell us the basic history that her dad had started the company, built it into what it was. It was a family-run business and was very clear and stated several times that this was very difficult for the family and that they did not like change. Made that statement several times. And she also looked over and specifically at [Gezahegne] Teffera[, a driver for the Company and member of the Union's bargaining committee,] and asked twice, "Why are you doing this to us?"
>
> It was—essentially, that was the conversation. It was just stating several times that this was very, very difficult for the family and the company.
>
> Q [by Counsel for the General Counsel]: And during the time period that you were there at FMCS, whether it was a couple of hours or whatever it was, at what portion was it that Marilyn said these? In other words, at the beginning, the end, the middle?
>
> A: It was throughout. Excuse me. At the beginning after introductions, she immediately went into saying the statements that this was very difficult for the family and the company. She made a comment in the middle and then at the end as well. She also, when we were having a discussion on just cause, saying that they didn't agree with just cause because she didn't want to give up control and was very clear on that statement.

(Tr. 155-156; see also Tr. 187 (Teffera's testimony that he was asked, "Why you did, Mr. Teffera, this thing for us[?]")).

5. The April 4, 2014, Bargaining Session

The parties bargained on April 4. Bill Locke, a staff representative for the Union, took over for Youngmark. Health insurance was not discussed at the April 24 bargaining session. (Tr. 164). Discipline that had already been imposed was not discussed. (Tr. 168-169).

6. The June 11, 2014, Information Request

On June 11, Locke sent Smith an information request for "any and all discipline that has been given to bargaining unit employees for the past 6 months." (G.C. Exh. 9 at *a*). Locke requested that this information be provided "on or before" the upcoming June 24 bargaining session. (*Id*.).

7. The June 24, 2014, Bargaining Session

The parties met again to bargain on June 24. (Tr. 165). Locke attended, as well as Western Cab drivers Mesfin Zemedkin and Gezahegne Teffera. (Tr. 165). Locke brought up the issue of health insurance. (Tr. 166). As far as Locke was aware, no changes had been made to employees' health benefits and the Company still required one year of employment before an employee was eligible for benefits. Locke had realized that the one-year requirement did not comply with the Patient Protection and Affordable Care Act ("PPACA") and he wanted to discuss the Company's non-compliance and bargain over changes to the health insurance. (Tr. 166). Immediately after bringing this issue up, Sarver told Locke that the Company was already in compliance with the PPACA. (Tr. 166). Sarver stated that the Company "had made the change in January of 2014"—meaning, the change from one year of employment to become eligible to the statutory maximum of the first of the month following sixty days of employment. (Tr. 166; GC Exh. 8). The Union had not been informed of the change. (Tr. 158, 166).

The Company did not yet have a response to the Union's June 11 information request, even though the request asked for the information to be provided at or in advance of the June 24 bargaining session. The Company did not inform the Union of any discipline imposed against any bargaining-unit employee at the June 24 bargaining session. (Tr. 169).

8. The Company's Response to the June 11 Information Request

On July 8, Smith sent Locke a list of the bargaining-unit employees who had been terminated in the previous six months.[4] (GC Exh. 10 at *a*). That list indicates that over 90 employees were terminated since January 1 for a variety of reasons. (*Id*. at *d-n*). The reasons include: being arrested while on-the-job; leaving the scene of an at-fault accident; tardiness; long-hauling; having a revoked Taxi Authority card; failure to turn in lost and found; unsatisfactory probation; use of cab to do personal business; assault and battery; attendance problems (no-call/no-shows or "N/C N/S"); customer abuse; reckless or unsafe driving; failure to turn in book; failure to report an accident; substance abuse violations; fighting; and high-flagging. (*Id*.).

On July 10, Smith sent Locke a list of the suspensions imposed against bargaining-unit employees from January 28 through July 8. (GC Exh. 11 at *a*). The list included 46 suspensions, for periods of one to six days. (*Id*. at *e-h*). Just as with the terminations, the suspensions were imposed for a variety of reasons or no reason at all, including: extreme low book; needing additional training; failure to properly fill out a trip sheet; attendance problems; taking a cab with the wrong medallion (and, therefore, service area); reckless driving; hostility towards other drivers; failure to drop money with the book; low productivity; lost and found issues;

[4] On June 27, the Company sent Locke a 27-page list of all disciplinary measures imposed since January 1. (R. Exh. 6). This list, however, did not list the level of discipline imposed or include any terminations and, therefore, did not fully respond to the Union's June 11 information request. It was simply a list of employees' names and alleged offenses.

insubordination; and at-fault accidents. (*Id*.). This was the Union's first notification of these suspensions.[5]

B. The Company's Section 8(a)(1) Violations

1. Prohibiting the Distribution of Trip Sheet *Magazine in August 2014*

The *Trip Sheet* magazine is a resource for Las Vegas taxi drivers. (Tr. 46). It includes information about which events are coming to Las Vegas, schedules for free or discounted shows for drivers, and information drivers can relay to their customers. (Tr. 46). In the past, the *Trip Sheet* magazine was available in the Western Cab drivers' break room. (Tr. 46, 48, 127).

Sarver testified that she has been disposing of *Trip Sheet* magazines since the summer of 2009. (Tr. 90). At the hearing, however, Sarver was contradicted by Joan Young. Joan Young has been a driver for Western Cab since 2013. (Tr. 118-119). Young stated that since she began working at Western Cab, up until August 2014, she was able to obtain copies of *Trip Sheet* in the drivers' break room. (Tr. 124). Availability of the *Trip Sheet* ended in August 2014. (Tr. 127 ("Q: So every month since you started working there until August of '14 every month you saw new *Trip Sheets* there in the room? A: Uh-huh. . . . there's usually a box or two in there.")). When Young became aware that the *Trip Sheet* was no longer available in the drivers' break room, Gerard (last name unknown), the day-shift supervisor, informed her that "they weren't allowed on the premises anymore and that we didn't have them." (Tr. 124).

The August 2014 edition of *Trip Sheet* was significant in only one way: it contained an advertisement placed by the Union and a letter to the editor from the Union. (GC Exh. 3 at *e*, *n*, *p*). The ad was directed at Western Cab and asked for "fair wages & benefits," an "end to unfair

[5] The Union was aware that Chris Maher, a bargaining-unit employee and member of the bargaining committee, had been suspended in April, but only because Maher himself told Locke about his suspension. (Tr. 172). The Company did not inform the Union of Maher's suspension until it provided the July 10 response.

& discriminatory discipline," and "[r]espect & dignity behind the wheel," as well as a "fair contract now." (*Id*. at *e*). The letter to the editor was from USW Local Union 711A, the Union's Las Vegas local representing cab drivers. The letter was titled "Drivers at Western Cab Deserve Respectful Treatment, Too" and went on to explain how negotiations for a contract have stalled, leading the drivers to file charges with the NLRB. (*Id*. at *n*, *p*).

2. Supervisor's Unlawful Comments about the Union

In the beginning of August 2014, Young attended a union meeting. (Tr. 119). After the meeting, she went to work and started a conversation with co-worker Carlos Pena. (Tr. 121). She told Pena that he missed a good meeting. (*Id*.). At that point, night-shift supervisor Vladimir Grigorov joined in, telling Young and Pena that they "do not need a Union. He said what do you need a Union for." (Tr. 121, 139-141). Pena agreed with Grigorov; Young walked away from the conversation. (Tr. 141).

III. ARGUMENT

A. The Company Made Unlawful Unilateral Changes to Mandatory Subjects of Bargaining without Providing Notice to the Union.

It is well-settled that an employer violates Section 8(a)(5) of the Act when it makes unilateral changes to represented employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Such a change is "a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal" to bargain. *Id*. at 743 (footnote omitted). Not every change triggers an employer's bargaining obligation. The obligation to bargain arises only when an employer makes a change to a mandatory subject of bargaining and the change has a "material, substantial, and significant impact on the employees' terms and conditions of employment." *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

When a unit is newly-established, an employer has a duty to maintain the *status quo ante* until an agreement or overall impasse is reached with the union. *WAPA-TV*, 317 NLRB 1159, 1159 (1995).[6] Sometimes maintenance of the *status quo ante* is a straightforward endeavor, preventing the employer from making changes to terms and conditions of employment. See *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), aff'd. 485 F.2d 1239 (6th Cir. 1973) (employer's past practice of buying employees one pair of boots per year part of *status quo ante* and could not be discontinued without bargaining with union). Sometimes, however, maintenance of the *status quo ante* requires the employer to *make* a change, as long as that change is made according to an established past practice. Thus, when an employer had a practice of granting a 1-percent wage increase on the anniversary of an employee's hire date, the practice had to be maintained when the union was recognized. *Id*. Because it was well-established, the annual change was the *status quo ante*.

Maintenance of the *status quo ante* presents an entirely different situation when the past practice involves the employer's use of discretion. When an employer exercises discretion over a mandatory subject of bargaining, then the employer must bargain over the discretionary aspect of the changes, even when making changes that are part of the established *status quo ante*. *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999); *Oneita Knitting Mills*, 205 NLRB 500, 500 fn. 1 (1973) ("What is required is a maintenance of preexisting practices, i.e., the general outline of the

[6] Certain exceptions to this rule exist. Employers bargaining a first contract need not await an overall impasse in negotiations if the change is a "discrete event, such as an annually scheduled wage review . . ., that simply happens to occur while contract negotiations are in progress." *Stone Container Corp.*, 313 NLRB 336, 336 (1993). An employer satisfies its obligation to bargain if it makes the change *after giving the union notice and an opportunity to bargain*. *Daily News of Los Angeles*, 315 NLRB 1236, 1244 fn. 2 (concurring opinion). Here, the *Stone Container* exception does not apply because no notice was given to the Union. Another exception is described in *Bottom Line Enterprises*, 302 NLRB 373 (1991), and allows for immediate implementation before overall impasse is reached when economic exigencies exist. No economic exigencies were identified here.

program, however the implementation of the program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted."). In those cases, it is the "*substantial degree* of discretion, as well as the *unavoidable exercise* of such discretion each time" an employer makes such a change, which triggers the employer's obligation to bargain with the union. *Washoe Medical Center, Inc.*, 337 NLRB 202, 202 (2001) (emphasis added).

As always, a necessary precursor to bargaining is notice of the proposed change. The duty to bargain requires the employer to "at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *Intersystems Design & Technology Corp.*, 278 NLRB 759, 759 (1986), quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983). "[I]f the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*." *Ciba-Geigy Phamaceuticals Div.*, 264 NLRB 1013, 1017 (1982). Presentation of a unilateral change as a *fait accompli* is a violation of Section 8(a)(5).

When an employer's "presentation of a change in terms and conditions of employment precludes a meaningful opportunity for the union to bargain," the union's failure to demand bargaining does not constitute a waiver. *Aggregate Industries*, 361 NLRB No. 80 (2014), 359 NLRB No. 156 slip op. at 4 (2013); see also *Gulf States Mfg. v. NLRB*, 704 F.2d at 1397 ("Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated."). Informing the union of a change that has already been made, and thereby precluding any meaningful bargaining over the issue, relieves the union of its obligation to demand bargaining and precludes a finding that any inaction on the union's part somehow

constitutes a waiver. *Intersystems Design & Technology Corp.*, 278 NLRB at 759. When presented with a *fait accompli,* the Union is fully within its rights to file charges with the Board, rather than request bargaining. *King Soopers, Inc.*, 340 NLRB 628, 635 fn. 3 (ALJD) (2003).

Here, as described below, the Company made two kinds of unilateral changes without notice to the Union: changes to eligibility for health insurance and discretionary discipline and discharge.

1. The Company Made Changes to Health Insurance without Notice to the Union.

Health insurance is a mandatory subject of bargaining. *E. I. DuPont De Nemours, Louisville Works*, 355 NLRB 1084, 1094 (2010), citing *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). Before the Union was recognized and through most of the current negotiations, the Company required one year of employment before an employee was eligible for health insurance. (GC Exh. 8). That was the *status quo ante.*

On January 1, the Company changed the one-year eligibility period requirement and made employees eligible for coverage on "the first of the month after sixty full days of employment." (GC Exh. 8). That was a change from the *status quo ante*. This change was made in order to avoid a penalty associated with the PPACA. Regardless of why the change was made, the change had a "material, substantial, and significant impact" on employees' terms and conditions of employment.[7] *Toledo Blade Co.*, 343 NLRB at 387.

The Union did not receive notice of this change until June 24—almost six months after the change was implemented. (Tr. 166; see also Tr. 116 (notices to employees (R. Exh. 1-2) never provided to Union)). In other words, the change to health insurance was a *fait accompli*. And, because the Union was presented with a *fait accompli*, the Union never had an opportunity

[7] It is irrelevant that the changes benefitted employees by making the eligibility period for health insurance. See *Josten Concrete Products Co.*, 303 NLRB 74 (1991).

to bargain about the change and did not waive the right to bargain over the change. *Aggregate Industries*, 361 NLRB No. 80. The unilateral change to health insurance was made in violation of Section 8(a)(5).

2. The Company Unilaterally Imposed Discipline with Material, Substantial, and Significant Effects on Employees' Terms and Conditions of Employment.

Grounds for discipline is a mandatory subject of bargaining. *King Soopers, Inc.*, 340 NLRB at 628 (2003). Some discipline, such as suspensions and terminations, has a "material, substantial, and significant impact" on employees' terms and conditions of employment. Once it is established that a change is over a mandatory subject of bargaining which has a "material, substantial, and significant impact" on employees' terms and conditions of employment, then the analysis of whether an employer is required to bargain over a change centers on the employer's use of discretion. *Toledo Blade Co.*, 343 NLRB at 387. This applies even when the change affects only one employee. *Carpenters Local 1031*, 321 NLRB 30, 32 and fn. 5 (1996) (holding that Section 8(a)(5) violation is possible even when change affects only one employee, if change has significant impact on employee's work). If an employer exercises discretion in imposing suspensions and terminations, then the discipline must be bargained with the union. *Washoe Medical Center*, 337 NLRB at 202*;* see also *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012).[8]

Here, Western Cab exercised discretion over every disciplinary action. There was no employee handbook or other document outlining rules, policies, or procedures kept by the Company. (Tr. 38). Furthermore, there was no consistency in the imposition of discipline for

[8] The Union recognizes that *Alan Ritchey* has been invalidated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (June 26, 2014). *Alan Ritchey* is cited for persuasive, not precedential, value. See *TGF Management Group Holdco, Inc.*, 22-CA-123003, JD(NY)-05-15, 2015 WL 194519 (NLRB Div. of Judges Jan. 15, 2015); *South Lexington Management Corp.*, JD(ATL)-02-15, 2015 WL 400624 (NLRB Div. of Judges Jan. 29, 2015) ("Although *Alan Ritchey* has no precedential value, I, nonetheless, adopt the Board's *Alan Ritchey* rationale, as I find it independently persuasive.").

each kind of offense. (Tr. 78-79). In other words, although the *status quo ante* established that Western Cab disciplined drivers, including suspensions and terminations, each exercise of that power involved discretion. The discretion was not only to a "substantial degree," but, given the fact that *every* disciplinary action was made on a case-by-case basis, the exercise of discretion was also "unavoidable." See *Washoe Medical Center, Inc.*, 337 NLRB at 202. As such, it had to be bargained.

Just as with the unlawful unilateral change to health insurance, the Company also failed to give the Union notice of the suspensions and terminations. (Tr. 157-158, 168-169). Indeed, it was the Union that requested information related to suspensions and terminations. Thus, the only notice the Union received of the discipline was instigated by the Union itself, and though the Company has since made offers to bargain over the discipline, the discipline was already a *fait accompli*. The Company's unilateral implementation and exercise of discretion over discipline has effectively precluded any meaningful opportunity to bargain over the issues and the Union was within its rights to file charges with the Board rather than request bargaining.[9] *King Soopers, Inc.*, 628 NLRB at 635 fn. 3 (ALJD), citing *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB at 1017.

Because the Company failed to give the Union any notices of suspensions and terminations—discipline that had a material, substantial, and significant impact on employees'

[9] In the event that the Company argues that some of its reasons for terminating or suspending employees were not discretionary, the Union contends that such analysis is best left to the compliance stage. *Uniserv*, 351 NLRB 1361, 1361 fn. 1 (2007). Here, the salient point is that unilateral changes to mandatory subjects of bargaining were made without notice being given to the Union.

working conditions—and the discipline was imposed according to the Company's discretion, the Company violated Section 8(a)(5).[10]

B. The Company Unlawfully Prohibited the Distribution of *Trip Sheet* Magazine.

A rule prohibiting the distribution of union literature during nonworking times in nonworking areas is presumptively unlawful. *Sprint/United Management Co.*, 326 NLRB 397, 398 (1998). "The mere assertion that a no-distribution rule is intended for a specific purpose does not prove that it is actually necessary for that purpose." *Id*., citing *Times Publishing Co.*, 231 NLRB 207, 210 (1977). The timing of rules is also indicative of violations of Section 8(a)(1). Namely, when a no-distribution rule's effective date is in close proximity to a union action, the Board can more easily infer a violation of 8(a)(1). *Bon Marche*, 308 NLRB 184 (1992).

Here, Young and Sarver's testimonies conflict about the availability of *Trip Sheet* in the Western Cab drivers' break room. Sarver stated that she has been removing *Trip Sheet* from the Company's premises since the summer of 2009. (Tr. 90). Young, however, testified in detail about how she saw *Trip Sheet* magazines at the beginning of every month since she began working at Western Cab—until, that is, August 2014. (Tr. 124). Young specifically recalled that multiple copies of *Trip Sheet* were available at the beginning of each month and were distributed in the drivers' break room in boxes. (Tr. 127). Meanwhile, Sarver claims that she would go into the drivers' break room in the morning and throw away the magazines she saw there. (Tr. 94).

[10] Because no notice was given, this matter does not present the question of what should happen when impasse is reached when parties are bargaining over discretionary discipline before a first contract exists. For the sake of clarity, however, the Union contends that the Board's *Alan Ritchey* analysis is correct: bargaining over the discretionary imposition of discipline falls within the exception to the rule established by *Stone Container* that an employer generally need not await overall impasse if the proposed change represents a "discrete event . . . that simply happens to occur while contract negotiations are in progress." 313 NLRB at 336. The key, again, is that the union receives notice from the employer a reasonable amount of time before the discipline is imposed—and, again, that is precisely what the Union did not receive here.

But Young's shift started at 2:30 p.m. and Young was often able to obtain a copy of the magazine, even though it was already afternoon and Sarver allegedly threw away the literature in the morning. (*Id*.). The credible evidence here establishes that *Trip Sheet* magazines were available at Western Cab before August 2014.

Sarver also testified that the distribution of *Trip Sheet* was prohibited because of Nevada's anti-diversion statute. (Tr. 90). The Company believed the drivers would be "tempted" by the information in the *Trip Sheet* to violate the anti-diversion law. (Tr. 95). But, the Company already had an independent practice of informing drivers about the anti-diversion statute—a practice that went so far as to require the drivers to sign an acknowledgment that they understood the law. (R. Exh. 6).

Apart from the fact that *Trip Sheets* were available on the premises, the Company's proffered reason for prohibiting the distribution is disingenuous. The significant difference between the August 2014 edition of *Trip Sheet* and other editions is the Union's advertisement directed at Western Cab and the Union's letter to the editor about the ongoing contract negotiations. (GC Exh. 3 at *e, n, p*). Given how the sudden prohibition on the distribution of the magazine coincides with the edition including Union-related information, as well as the Company's other methods of informing drivers of the anti-diversion statute, the prohibition was unlawful and in violation of Section 8(a)(1). *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

C. The Company Made Unlawful Comments about or Related to the Union.

An employer violates Section 8(a)(1) when it denigrates the union and conveys the idea that continued union representation would be futile. *Regency House of Wallingford, Inc.*, 356 NLRB No. 86, slip op. at 5 (2011), citing *Billion Oldsmobile Toyota*, 260 NLRB 745, 754 (1982), enfd. 700 F.2d 454 (8th Cir. 1983); see also *Davis Electric Wallingford Corp.*, 318

NLRB 375 (1995) (disparaging effectiveness of union unlawful). The well-established test for evaluating whether interrogations reasonably tend to restrain, coerce, or interfere with the exercise of employees' Section 7 rights requires the Board to assess all of the circumstances. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Context is also important to finding that employer speech is disparaging to the union. *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004).

Here, the Director of the Company, Marilyn Moran, made numerous remarks at the February 4 bargaining session that amounted to one message: because of the family-run nature of the business, the family would never agree to union representation—no changes would come about as a result of the Union. (Tr. 155-156). These statements were compounded by Moran's direct pleas to long-time driver Teffera, asking him why he was doing "this" ("this": choosing to be represented by the Union) to "us?" (*Id.*; Tr. 187). Coupled with the Company's propensity for making unilateral changes to mandatory subjects of bargaining without giving the Union notice, the context shows that the Company sought to denigrate and disparage the Union, as well as convince employees that union representation was a futile endeavor.

The comments made by Grigorov to Pena and Young should be viewed within the same context. Young was speaking to Pena about the Union meeting she had just attended. Grigorov barged in and interrogated them, "what do you need a union for?" (Tr. 139-141). Then he stated that the employees did not need a union at all. (*Id*.). The context of the recent prohibition of *Trip Sheet* magazine in the beginning of August adds to the coercive nature of Grigorov's comments.

The Union notes that the Company failed to call any of its own witnesses to rebut the witnesses' testimony about the statements. It is well-settled that an adverse inference can be drawn from a party's failure to call a witness to rebut another witness's testimony. *New Vista*

Nursing & Rehabilitation, LLC, 358 NLRB No. 55 slip op. at 9, citing *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). Here, the comments show a violation of Section 8(a)(1).

D. The Company's Affirmative Defenses Fail.

In its Answer to the Second Consolidated Complaint, Western Cab raises several affirmative defenses. (GC Exh. 1(u)). They all fail.

First, the Company alleges that the Union has engaged in bad-faith bargaining. (GC Exh. 1(u) at 3). "In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001) (internal citations omitted), enfd. 318 F.3d 1173 (10th Cir. 2003). The Board may look at a variety of factors for evidence of bad-faith bargaining including, but not limited to, "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, . . . failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (internal citations omitted).

Here, the credible evidence does not establish the Union engaged in any of the factors that demonstrate bad-faith bargaining. And, from a common-sense perspective, it would be impractical and counterproductive for the Union to engage in bad-faith bargaining because it wants a collective-bargaining agreement for the Company's drivers.

Second, the Company contends that its changes to health insurance were "made pursuant to specific mandate of the U.S. Government." (GC Exh. 1(u) at 3). Although the PPACA applies a penalty for plans that do not comply with the statute's maximum eligibility period, it in no way

absolves an employer of its obligation to bargain over changes to mandatory subjects of bargaining under the NLRA or of its duty to provide notice of those changes to the *status quo ante* before implementation. If the Union had received notice of the change, it could have bargained something *better* than the PPACA's minimum requirements. Since the change was unilaterally made, the Union did not have the opportunity to bargain over any aspect of the change.

Third, the Company alleges that it has "affirmatively offered to bargain with the Union on every other issue alleged in this Complaint." (GC Exh. 1(u) at 3). Presumably, the Company is here referring to the suspensions and terminations it imposed without notice to the Union. As discussed above, the Company presented the Union with numerous *faits accompli* and, therefore, the Union was within its rights to file unfair labor practice charges against the Company rather than demand bargaining. *King Soopers, Inc.*, 340 NLRB at 635 fn. 3.

Finally, the Company alleges that "early in negotiations," the parties "worked out a procedure for the union to protest and trigger bargaining about the discharge of employees after they were discharged." (*Id*.). However, General Manager Sarver testified that the *only* tentative agreement that was immediately implemented was related to the use of credit card machines. (Tr. 33-34, 83-84). In particular, Sarver's testimony reveals that no procedure for handling discipline was in place:

> Q [by Counsel for the General Counsel]: Now, the company and the Union never reached a TA agreement as far as how they were going to handle terminations; is that right?
>
> A: That's correct.
>
> Q: And the company and the Union never reached a TA agreement as far as how they were going to handle suspensions; is that right?
>
> A: That's correct.

(Tr. 35).

Emails from Company's counsel also indicate that no procedure was bargained over how to handle discipline. Rather, in Smith's July 8 email to Locke, he unilaterally stated that

> . . . in the future, Western Cab will send notice to the union of any contemplated discipline that would cause a financial impact on an employee (such as disciplinary suspensions and discharges) and offer to discuss such contemplated discipline or discharge with the union before the actual event.

(GC Exh. 10 at *a*). This is echoed in Smith's July 10 email to Locke: "future terminations and suspensions will be held in abeyance for 24 hours after Western Cab gives notice to the union of the pending action." (GC Exh. 11 at *a*). Informing Locke of the Company's unilateral decision to provide twenty-four hours' notice would not be necessary if the parties had already agreed upon a procedure. Moreover, since Smith conveyed this plan on July 8, it concerns none of the disciplinary incidents at issue here, because they all precede that date. Therefore, all the Company's affirmative defenses fail.

IV. REMEDY REQUESTED

The Union respectfully requests that the Administrative Law Judge award the fullest remedy allowed by law, including an order that the Company cease and desist from changing the terms and conditions of employment of unit employees without first notifying the Union and giving it an opportunity to bargain; cease interrogating bargaining-unit employees; cease making disparaging statements about the Union; making statements about the Union's futility; post a notice for 60 days describing the ways it has violated the Act and the steps it will take to comply with the Act in the future; and hold meetings, during working time, scheduled to ensure the widest possible attendance, at which the notice is to be read to the employees assembled for this purpose by a responsible official of the Company. Representatives of the Board and the Union

should be given an opportunity to be present at the aforesaid meetings for the reading of the notice.

The Union further requests that the Administrative Law Judge order restoration of the *status quo ante* conditions; issue an appropriate make-whole remedy and offer reinstatement to all affected bargaining-unit employees (discussed further, below); that the Company engage in bargaining over the unilateral changes, at the Union's request; and, for a period of six months, for the Company to submit written bargaining status reports over the unilateral changes every thirty days to the compliance officer of Region 28, serving copies thereof on the Union.

A. Restoration of the S*tatus Quo Ante* Requires Reinstatement and Making the Unilaterally-Disciplined Employees Whole.

Reinstatement and backpay for the unilaterally-disciplined employees are appropriate remedies here and within the Board's powers.

> Pursuant to the Board's established and court-approved policy, "in cases, like here, involving a violation of Section 8(a)(5) based on a respondent's unilaterally altering existing benefits, it is [customary] to order restoration of the *status quo ante* to the extent feasible, and in the absence of evidence showing that to do so would impose an undue and unfair burden on the respondent." Such a remedy in the form of a reimbursement order for lost wages is warranted to "prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining undue advantage at the bargaining table when he bargains about the benefits which he has already discontinued."

Daily News of Los Angeles, 315 NLRB at 1241, quoting *Allied Products Corp.*, 218 NLRB 1246, 1246 (1975), enfd. 548 F.2d 644 (6th Cir. 1977); *John Zink Co.*, 196 NLRB 942 (1972); *Herman Sausage Co.*, 122 NLRB 168, 172 (1958), enfd. 275 F.2d 229 (5th Cir. 1960).

In situations like the one presented here, "a make-whole remedy is appropriate since the 'loss of employment stems directly from an unfair labor practice.'" *Taracorp. Industries*, 273 NLRB 221, 222 (1984), citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964). Indeed, the Board has historically applied a variety of remedies in order to restore the

status quo ante. See *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999) (ordering restoration of *status quo ante* by reinstating operations at facility unlawfully closed by employer); *Eugene Iovine, Inc.*, 328 NLRB 294 (1999) (making employees whole after unlawful unilaterally implemented layoff); *Adair Standish Corp.*, 292 NLRB 890 (1989) (reinstating and making whole employees affected by unilateral change of layoff for lack of work); *Delta Tube & Fabricating Corp.*, 323 NLRB 856 (1997) (employer ordered to revoke unilaterally-implemented drug and alcohol policy and rescind discipline received under that policy); *Uniserv*, 351 NLRB 1361 (2007) (ordering reinstatement of and backpay for employees discharged as a result of unlawful implementation of zero-tolerance drug policy); *TGF Management Group Holdco, Inc.*, 22-CA-123003, JD(NY)-05-15, 2015 WL 194519 (NLRB Div. of Judges Jan. 15, 2015) (reinstating and making employee whole who was disciplined without notice to the union).

In situations where the discipline results from a unilateral change, reinstatement and backpay are the proper remedies. In *Uniserv*, the employer unilaterally implemented a "zero-tolerance" drug policy with unannounced drug tests; the previous drug policy provided only for testing in certain circumstances. 351 NLRB at 1366. The Board found that the change was unlawful and should have been bargained with the union. In order to restore the *status quo ante*, the Board ordered reinstatement of the employees who would not have been discharged under the preexisting policy. *Id*. at 1362.

The *Uniserv* Board took pains to distinguish that decision from *Anheuser-Busch*. *Anheuser-Busch* held that Section 10(c) of the Act prohibited the Board from granting reinstatement when the discipline was imposed "for cause." 351 NLRB 644, 650 (2007). The holding of *Anheuser-Busch*, however, is limited to a situation not present here–namely, where the offenses leading to discipline were "uncovered through unilaterally and unlawfully

implemented means." *Id*. The holding of *Anheuser-Busch* has no application here because the only issue is the Company's unilateral imposition of discretionary discipline.

Anheuser-Busch, however, also states that "a termination of employment that is accomplished without bargaining with the representative union is unlawful under Section 8(a)(5) and is not 'for cause.'"[11] *Id*. at 648, citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 217; see also *Detroit News*, 319 NLRB 262, 262 fn. 1 (1995) ("in cases such as this involving a violation of 8(a)(5) based on an employer's unilateral alteration of terms and conditions of employment, it is customary to order restoration of the status quo ante to the extent feasible"). In *Uniserv*, there was no change in the method of detecting the offense—rather, the change was what level of discipline could be meted out, and that change was made without bargaining with the union. 351 NLRB at 1361 fn. 1.

Here, too, the unlawful aspect of the discipline is not the means of detecting the offense. The violation is that the Company exercised discretion and made a change without bargaining with the Union. A make-whole remedy is entirely proper because that is the only way the *status quo ante* can be restored. Here, there are no means of determining with the evidence presented whether employees "clearly violated preexisting rules, and thus were discharged or disciplined for cause" because there *are* no preexisting rules. *Anheuser-Busch*, 351 NLRB at 650. (See Tr. 38). Indeed, part of the problem here is that the Company exercised discretion over *every* disciplinary action and, therefore, no particular iteration of a work rule can be rescinded so as to

[11] Section 10(c) states that the Board cannot require reinstatement of any individual that was "suspended or discharged for cause." The Board has clarified that "the term was intended to refer to discipline that is not imposed for a reason that is prohibited by the Act." *Anheuser-Busch*, 351 NLRB at 647. Here, the employees were not terminated "for cause" because the discipline was made without notification to the Union and entirely at the Company's discretion: that is a reason prohibited by the Act.

restore the *status quo ante*, as was possible in *Anheuser-Busch*.[12] No *status quo ante* exists at Western Cab regarding what offenses merit which level of discipline because, again, the Company exercised discretion on an unavoidable, case-by-case basis. (Tr.78-79). A failure to reinstate employees and make them whole would allow the Company to gain "undue advantage at the bargaining table" because the Company would be bargaining over things it has already achieved unilaterally. *Daily News*, 315 NLRB at 1241. In addition, if the numerous unilateral discharges of bargaining-unit employees were permitted to stand, this would have a tendency to

[12] The Union believes the dissenting opinion in *Anheuser-Busch* comports better to the goals of the Act and preexisting Board law and *Anheuser-Busch* should be overruled to the extent that it prohibits the rescission of discipline imposed in violation of Section 8(a)(5). Here, since the Company exercises discretion over every disciplinary action, no *status quo ante* exists—at least with regards to discipline. No remedy outside of reinstatement and backpay can adequately remedy the violation. As stated in the *Anheuser-Busch* dissent:

> Discipline imposed pursuant to an unlawful unilateral change is doubly destructive: it damages both the affected employees and the union's status as bargaining representative. The union's status is 'further damaged with each application of the unlawfully changed term or condition of employment. No otherwise valid reason asserted to justify discharging the employee can repair the damage suffered by the bargaining representative. . . . ." *Great Western* [*Produce, Inc.*], [299 NLRB 1004,] 1005 [(1990)]. Here, it is unlikely that the Union's status will be repaired in the eyes of the unit employees unless the affected employees are made whole for losses resulting from the Respondent's unlawful conduct. In practical terms, the employees will see that their employer has engaged in spying on their activities that violated the National Labor Relations Act, but that their bargaining representative was incapable of either preventing it or effectively remedying the harm that flowed from it.

351 NLRB at 655. See also *id.* at fn. 9 ("It is highly unlikely that the employees here will be comforted or feel vindicated by an order that does no more than direct their employer to behave, the next time."). It makes no sense to allow an employer, like the one here, to make any disciplinary actions it wants without bargaining and have little recourse besides a notice posting to reestablish the *status quo ante*—particularly when the entire situation could have been avoided by various means well within the Company's control, such as having set work rules, bargaining a grievance procedure with the Union that could be implemented before having a contract, or coming to an agreement on a collective-bargaining agreement with the Union.

weaken the bargaining strength of the Union and undermine the Union in the eyes of the bargaining-unit employees.

The Union recognizes the possibility that some of the discipline issued may have been warranted. At present, the Union is unable to determine which discipline that would be because it was presented with a *fait accompli*. In any event, this possibility should not affect the remedy awarded here because the Company will have a chance at the compliance stage to demonstrate why it discharged or suspended each employee. *Uniserv*, 351 NLRB at 1361 fn. 1, citing *Allied Aviation Fuel*, 347 NLRB 248, 248 fn. 3 (2006).

Finally, although the invalidated *Alan Ritchey* decision was applied prospectively, the Union respectfully requests that the remedy here be applied retroactively. Until the Supreme Court issued *Noel Canning* on June 26, 2014, *Alan Ritchey* was a precedential Board decision. Almost all the discipline at issue here was imposed before June 26, 2014.[13] (See GC Exh. 10-11). Thus, at the time the Company imposed the vast majority of discretionary suspensions and terminations, it had notice of the Board's opinion that an employer should give a union notice of such discipline, as well as an opportunity to bargain. The Company will face no prejudice by having the remedy retroactively applied because, for all intents and purposes, it knew what the law was at the time of its unlawful unilateral imposition of discretionary discipline.

[13] The only discipline at issue here that was imposed after June 26 are the suspensions of employees John Uvino, Gloria Estrada-Deenzer, Jonathan Jackson, and Muqtar Aden (GC Exh. 11 at *h*) and the termination of Merih Ghebresilassie (GC Exh. 10 at *g*).

V. CONCLUSION

For the reasons stated above, the Union respectfully requests that the Administrative Law Judge find that Western Cab violated Section 8(a)(1) and (5) of the Act.

Respectfully submitted,

Mariana Padias
Assistant General Counsel
Five Gateway Center, Room 807
Pittsburgh, PA 15222
Tel: 412-562-2466
mpadias@usw.org

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

March 4, 2015

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Charging Party's Post-Hearing Brief was served via electronic mail this 4th day of March, 2015, upon:

Gregory E. Smith, Attorney at Law
Hejmanowski & McCrea LLC
520 South Fourth Street, Suite 320
Las Vegas, NV 89101
Fax: 702-834-5262
E-mail: ges@gmlawlv.com

Larry A. Smith
Kristin White
Counsel for the General Counsel
National Labor Relations Board, Region 28
600 Las Vegas Blvd. South, Suite 400
Las Vegas, NV 89101-6637
Fax: 702-388-6248
E-Mail: larry.smith@nlrb.gov; kristin.white@nlrb.gov

United Steelworkers International Union